

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Intervenor
Compensation Program.

FILED
PUBLIC UTILITIES
COMMISSION
xxxx xx, 2006
SAN FRANCISCO OFFICE
RULEMAKING 06-xx-xxx

ORDER INSTITUTING RULEMAKING**Introduction**

Today's order invites comment on proposed revisions to the Commission's intervenor compensation program. First, we propose rules to (1) codify Commission precedent regarding eligibility and compensable costs, (2) provide intervenors with greater flexibility in filing notices of intent, (3) enact accounting and documentation requirements to facilitate Commission review and determination of eligibility and compensable costs, and (4) adopt a mechanism for providing notices of intent to claim compensation for judicial review costs. These amendments will be codified in our Rules of Practice and Procedure, and today's order begins the notice-and-comment process for that purpose.

Second, we propose to eliminate the intervenor compensation fund adopted in Decision (D.) 00-01-020. We propose instead to allocate intervenor compensation payment responsibility in quasi-legislative rulemakings among all utilities in the affected industry or industries with California jurisdictional

revenues over a stated amount (\$10 million for water utilities, \$50 million for energy and telecommunications utilities).

Rules Amendments

1. Summary

Most of the proposed rules stem from the interrelationship and tension between the four determinations that must be made in assessing a request for an award of intervenor compensation: customer status, significant financial hardship, the issues on which a substantial contribution to a Commission decision is ultimately made, and the reasonableness of the requested compensation.

Pub. Util. Code § 1804(a)(2) requires an intervenor to file a notice of intent within 30 days of a prehearing conference (PHC), if any is held, stating the nature and extent of the customer's planned participation, and itemizing the compensation that the customer expects to request; the notice of intent may also include the intervenor's showing that the participation would pose a significant financial hardship.¹ Section 1804(a)(1) anticipates that parties might be unable to identify the scope of their planned participation and budget within this timeframe, and provides that the Commission may determine procedures for accepting new or revised notices of intent.

Our experience shows that it can be difficult for intervenors to realistically anticipate the scope of their planned participation so early in the proceeding. On the other hand, intervenors may want to have some indication of eligibility before undertaking a significant amount of work in the proceeding.

¹ Subsequent statutory references are to be Public Utilities Code unless otherwise indicated.

Similarly, the Commission benefits from an early indication of the range of parties intending to take an active part in a proceeding, the interests those parties would represent, and at least a tentative list of the issues those parties would raise. We therefore propose to allow intervenors to seek earlier preliminary determinations of eligibility.

We note, however, the tension between an early preliminary determination of eligibility and the concern that intervenors may be unable to identify issues, and propose realistic budgets, early in the proceeding. We therefore propose to allow intervenors to amend their notices of intent after the issues in the proceeding have been identified. This will provide a better basis for the Commission to comment on the intervenor's expectation for compensation under § 1804(b)(2).

We also address the relationship between the determination of customer status and the other prerequisites to intervenor compensation. Section 1802(b) is somewhat ambiguous, defining the term "customer" by reference to that very term: "customer" is defined as a participant representing "customers," a representative authorized by a "customer," or a representative of a group or organization authorized to represent the interest of residential "customers." However, while virtually all California citizens and entities are subscribers of utilities subject to the Commission's jurisdiction, the intervenor compensation statutes are not reasonably interpreted to confer "customer" status on all subscribers. Rather, we interpret § 1804 to require that the intervenor's participation in the proceeding be on behalf of its interest as a customer.²

² Pub. Util. Code § 1802(g) reflects this principle by defining "significant financial hardship," with respect to groups, by reference to the economic interest of its members.

We therefore propose to require intervenors to identify their economic interest in the proceeding, so that we can fairly evaluate the intervenor's customer status as well as financial hardship. This rule codifies a long line of decisions assessing customer status and financial hardship by reference to the intervenor's economic interest in the proceeding. (*See, e.g.*, D.04-06-002, D.05-01-006, and D.05-02-054.)

Even if an intervenor is ultimately found to meet the requirements of customer status and significant financial hardship, the intervenor is only entitled to compensation for reasonable costs that were incurred in the course of making a substantial contribution to a Commission decision. We propose to require intervenors to account for their costs specifically by reference to the issues to which they claim to have made a substantial contribution. However, we also recognize that issues in a proceeding may not be fully identified until after an intervenor has begun to incur costs to participate. Some of those costs may be general and not attributable to a particular issue. We propose to permit compensation for such costs.

These proposed rules provide additional guidance to intervenors on the scope of compensable participation, while reflecting the practical constraint that a final determination of compensability cannot be made until the conclusion of a proceeding.

2. Time for Filing Notice of Intent

Section 1804(a)(2) requires an intervenor to file a notice of intent to claim compensation within 30 days after the prehearing conference, if any, is

held. We propose to allow the notice of intent to be filed any time before the prehearing conference as well. This will allow intervenors to obtain an earlier preliminary determination of eligibility in advance of committing significant resources to participation in the proceeding.

We also propose a time for filing the notice of intent in petitions for rulemakings and in proceedings where it has been preliminarily determined that a hearing is not needed (and a PHC is not required under Rule 6.2). Specifically, we propose that notices of intent in such proceedings shall be 30 days after the time for filing responsive pleadings in the proceeding (*e.g.*, protests, responses, answers, or comments.) If, notwithstanding the preliminary determination, a PHC is nevertheless held, our proposed rule regarding amended notices of intent will provide the opportunity to amend the notice of intent after the issuance of the scoping memo.

3. Amended Notice of Intent

As discussed above, although intervenors as well as the Commission may benefit from a determination of scope of participation and eligibility early in a proceeding, the scope of a proceeding and the issues on which intervenors intend to participate may not be fully identified until later. We propose to permit intervenors to file an amended notice of intent after the determination of issues in a proceeding.

Specifically, Rule 6.3 of the Commission's Rules of Practice and Procedure, which was adopted after the enactment of the intervenor compensation statutes, now requires the assigned Commissioner to rule on a scoping memo to finally determine the issues to be addressed in a proceeding. Our proposed rule would permit intervenors to file an amended notice of intent by no later than 15 days after the issuance of the scoping memo.

4. Contents of Notice of Intent

Section 1804(a)(2) requires the notice of intent to state the nature and extent of the planned participation, and an itemized estimate of the expected compensation for that participation. We propose to require, more specifically, that the intervenor provide the itemized estimate with reference to the specific issues upon which the intervenor intends to participate. This will facilitate the ALJ's ability, under § 1804(b)(2), to provide guidance regarding the intervenor's realistic expectation for compensation.

Only customers, as defined in § 1802(b), are eligible for intervenor compensation. However, the statute does not describe the showing to verify customer status. We propose to require the intervenor to provide specific documentation of customer status.

Finally, as discussed earlier, we propose to require a statement of the intervenor's economic interest in the proceeding, for purposes of evaluating both customer status and financial hardship.

5. Notice of Intent Regarding Costs of Judicial Review

Pursuant to § 1804(a), intervenors who intend to seek a compensation award must file a notice of intent, early in the proceeding, identifying the issues upon which they intend to participate and an estimated budget for that participation. As defined in § 1802(a), compensable costs include the fees and costs of obtaining judicial review, if any. However, it is neither the practice nor practicable for intervenors to identify and estimate the budget for obtaining judicial review at the start of a Commission proceeding, when they must give notice of intent to claim compensation. As a result, requests for compensation for judicial review costs may be made to the Commission well after a proceeding

has been closed, and with no prior notice of the estimated costs or the issues to be litigated.

We propose to require intervenors who intend to seek a compensation award for costs of judicial review to file a notice to that effect within a reasonable period after the start of judicial review. This will provide the notice required by § 1804(a) with respect to compensation for costs of judicial review, and will afford the Commission the opportunity to point out, in ruling on the notice, “similar positions, areas of potential duplication in showing, unrealistic expectation for compensation, and any other matter that may affect the customer’s ultimate claim for compensation” as anticipated in § 1804(b)(2).

We will not require an intervenor that has previously been found to meet the statutory definition of “customer,” or to have demonstrated significant financial hardship, to renew its showing with respect to these eligibility requirements. The proposed rule does, however, require the intervenor to identify the issues upon which it intends to participate in judicial review and to make an itemized estimate of the compensation that the intervenor expects to request, as required by § 1804(a)(2)(A). In addition, the proposed rule requires an intervenor that intends to support the Commission to show why it expects that its participation in judicial review will supplement, complement or contribute to the Commission’s defense of its decision upon judicial review. (*See* §§ 1801.3(f) and 1802.5.)

6. Costs Prior to Start of Proceeding

We recognize that parties may incur costs associated with participation in a proceeding before the start of the proceeding. For example, parties may participate in workshops or briefings by utilities regarding an impending application, or begin case planning on a proceeding that has been scheduled but

not yet filed. (*See, e.g.*, D.05-05-046 and D.04-08-025.) We propose to codify the principle that such costs, if reasonable, are compensable.

7. Accounting of Costs

Eligible intervenors are entitled to compensation for the reasonable costs of substantially contributing to a Commission decision. Specifically, compensability consists of the following elements: a *recommendation* by the intervenor that is *adopted* by the Commission in *resolving* a procedural or substantive *issue* in the proceeding. Intervenors' requests for compensation must contain an accounting that links all costs claimed (hours worked and miscellaneous expenses) with all of these elements, so that the requests are fully auditable. We propose to require intervenors to maintain and include in their requests for compensation an account of the costs that references them to issues in the proceeding. This requirement is necessary in order to enable the Commission to identify the costs associated with those issues which are the subject of the intervenor's substantial contribution, and to conduct the requisite reasonableness analysis.

In addition, we propose to require that, in a proceeding with multiple intervenors, the request include a showing and detailed accounting that the participation for which the intervenor requests compensation was efficiently coordinated with the participation of any party with similar interests. The statute is clear that an intervenor may receive compensation for participation that materially supplements, complements or contributes to the participation of other parties, including Commission staff. However, the burden will be on the intervenor to establish the materiality of its participation. This proposed rule will assist the Commission in making that necessary determination. (*See* §§ 1801.3(f) and 1802.5.)

Elimination of Intervenor Compensation Fund

Under the current procedure adopted in D.00-01-020, all utilities in the affected industry pay intervenor compensation awards in quasi-legislative rulemaking proceedings where the Commission sets policy applicable to an industry or multiple industries. Specifically, we allocate a portion of the annual user fees collected from all regulated water, telecommunications and energy utilities to the intervenor compensation program fund, from which we direct payment to pay any intervenor compensation awards in quasi-legislative rulemaking proceedings where no specific respondents are identified.³

Now, after nearly five years of practical experience, we question the continuing need and practicality of paying eligible intervenors out of a user-fee funded intervenor compensation fund. We propose to modify D.00-01-020 to eliminate the intervenor compensation fund, and to instead allocate intervenor compensation payment responsibility among all utilities (in the affected industry or industries) with California jurisdictional revenues over a specified threshold. We propose a threshold of \$10 million for water utilities and \$50 million for all other utilities.

Our purpose when we adopted the current procedure in 2000 was to eliminate the former practice of obligating only one or two of the biggest utilities to bear the compensation responsibility when the rulemaking affects an entire industry or industries. The procedure acknowledged the increasing

³ As noted, the procedure excepts those rulemakings in which the Commission names respondent utilities; in those rulemaking, the respondents must pay any awards to intervenors. In practice, we have found that naming respondents in broad policy setting rulemakings may be hard, precisely because our intent is to create rules for the entire industry.

competitiveness in some of the industries we regulate, and tried to be more equitable to all service providers and their customers. Equally important, however, was that the procedure, while broadening the payment responsibility, not increase the administrative burden and the risk of non-payment borne by intervenors, who potentially must otherwise seek payment from all regulated utilities in a given industry.

Unfortunately, we have found the procedure to have significant problems. The intervenor compensation fund diverts user fee funds from other Commission budgetary expenses. In addition, although we were confident in 2000 that the cost of the fund was minimal and sufficiently predictable so that the impact on the Commission budget would be insignificant and easily managed, this has proven not to be the case.

The intervenor compensation fund has been allocated an annual budget of \$750,000 under the State's budgetary process. From 2001 through 2003, and to date in 2005, the fund has paid out less than a third of that amount in each year. While for the most part, there were no shortfalls, we are concerned that this overfunding in effect diverted resources that could have been better used elsewhere in our administration. On the other hand, the amount of fund awards paid in 2004 exceeded the annual budget by well over \$100,000.

We propose to eliminate the procedure, but in so doing, we face again the tension addressed in D.00-01-020 between placing undue administrative burden on utilities and intervenors, on the one hand, and inequitably allocating responsibility for payment to some, but not all, utilities affected by a rulemaking. The administrative burden on utilities and intervenors that would result from allocating payment responsibility to all utilities has not changed since our consideration of this issue in 2000. It would not be reasonable to expect

intervenors to collect their awards from dozens or even hundreds of utilities, nor would it be reasonable to expect small utilities to calculate their small individual shares of awards in rulemaking proceedings in which they may not even have participated. The result of such a collection procedure would be that utilities and intervenors would incur substantial administrative costs, contrary to the legislative intent (*see* § 1801.3(b)) that the intervenor compensation program be run efficiently.

We believe the following proposal will equitably allocate payment responsibility without unduly increasing the administrative burden on utilities and intervenors. In any quasi-legislative rulemaking affecting an entire industry or industries, in which there are no named utility respondents, any water utility with California jurisdictional revenues (as most recently reported to the Commission) of more than \$10 million, and/or any electricity, gas, or telephone utility with revenues of over \$50 million, will be allocated a share of payment responsibility for any intervenor compensation awarded in the proceeding, based on the ratio of its California jurisdictional revenues to the revenues of all utilities with payment responsibility.

Scoping

In this part of today's decision, we announce preliminary determinations and scoping, as required by Rule 6(c)(2). This proceeding is quasi-legislative in character. We see no need for a formal hearing. The general issue for the proceeding is implementation of certain provisions of § 1801 *et seq.* regarding intervenor compensation.

The Chief Administrative Law Judge will submit a Notice of Proposed Rulemaking, the attached draft of the proposed rules, and all other required documents to the Office of Administrative Law (OAL) for publication in the

California Regulatory Notice Register. This publication starts the 45-day notice and comment period, which is the first stage leading to the adoption and codification (in the California Code of Regulations) of the proposed rules. For purposes of such publication, the Chief Administrative Law Judge is authorized to propose nonsubstantive changes to the draft whenever such nonsubstantive change will improve the clarity or consistency of the rule. This order, including the text of the proposed rule amendment, and other documents submitted to the OAL will also be published on our web site.

During the 45-day period following publication of the Notice of Proposed Rulemaking, written comments on the proposed rules, as well as on the proposed elimination of the intervenor compensation fund and the proposal for its replacement procedure, may be filed in this proceeding. We also provide for the opportunity to file reply comments on the proposals.

We project final adoption of these proposals and submission of the proposed rules to the OAL within six months of the publication of the Notice of Proposed Rulemaking in the California Regulatory Notice Register; however, in no event will the time to finally resolve this proceeding exceed 18 months from the effective date of today's decision.

O R D E R

IT IS ORDERED that:

1. This Order Instituting Rulemaking will be served initially on the attached service list. Any interested person may request inclusion on the service list for this rulemaking by writing to the Commission's Process Office by May 31, 2006; the updated service list will be published by ruling and at the Commission's Internet site (www.cpuc.ca.gov).

2. The Chief Administrative Law Judge will send today's decision and all required forms to the Office of Administrative Law in accordance with applicable provisions of the Government Code. For purposes of publishing the appended proposed rule amendment in the California Regulatory Notice Register, the Chief Administrative Law Judge is authorized to make nonsubstantive changes to the proposed rule amendment as may be required to prepare the rule for publication or to improve the overall clarity or consistency of the proposal.

3. The Chief Administrative Law Judge will publish the Notice of Proposed Rulemaking, the text of the proposed rules, and our initial statement of reasons for the proposed rule amendment to the Commission's Internet site.

4. Comments on the proposed rules amendments appended to this Order, and on the proposed elimination of the intervenor compensation fund must be filed and served on the updated service list on or before July 5, 2006.

Reply comments must be filed and served on or before July 17, 2006. The comment period may be extended by a ruling of the assigned Administrative Law Judge.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

Proposed Rules Amendments to Article 18.1 of the Commission's Rules of Practice and Procedure

76.73. ~~(Rule 76.73) Costs on Rehearing~~⁴

~~The customer may include, in its request for an award of compensation, reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs incurred as a result of an application for rehearing.~~

~~Note: Authority cited: Section 1701, Public Utilities Code. Reference: Section 1804, Public Utilities Code.~~

76.74. (Rule 76.74) Filing a Notice of Intent in Certain Cases; Revised Notices of Intent

(a) A notice of intent to claim compensation may be filed:

(i) in a proceeding in which there has been a preliminary determination that hearing is needed, any time after the start of the proceeding until 30 days after the prehearing conference.

(ii) in a proceeding in which there has been a preliminary determination that hearing is not needed, any time after the start of the proceeding until 30 days after the time for filing responsive pleadings (e.g., protests, responses, answers, or comments).

(iii) in a petition for rulemaking, any time after the petition is filed until 30 days after the time for filing responses. If the petitioner intends to request compensation, the petition itself may include a notice of intent.

(iv) in a proceeding ~~In cases where no prehearing conference is scheduled or where the Commission anticipates that the proceeding will take less than 30 days, the administrative law judge may establish a deadline for filing a notice of intent.~~

⁴ Rule 76.73 is reflected, with minor modifications, in proposed Rule 76.75(d), below.

~~(b) In cases where parties cannot reasonably identify issues within the time set by statute or by the administrative law judge's ruling under subsection (a) for the filing of the notice of intent, or where new issues emerge after the time set for filing, the administrative law judge may specify an appropriate procedure for accepting new or revised notices of intent.~~

(b) An amended notice of intent may be filed within 15 days after the issuance of the scoping memo in the proceeding.

(c) The notice of intent shall identify all issues on which the intervenor intends to participate and seek compensation, and shall separately state the expected budget for participating on each issue. The notice of intent may include a category of general costs not attributable to a particular issue.

(d) The notice of intent shall provide either (1) verification of the intervenor's customer status pursuant to Pub. Util. Code section 1804(b)(1)(A) or (B), or (2) a copy of articles of incorporation or bylaws demonstrating the intervenor's customer status pursuant to Pub. Util. Code section 1804(b)(1)(C). If current articles or bylaws have already been filed with the Commission, the notice of intent need only make a specific reference to such filings.

(e) The notice of intent shall state the intervenor's economic interest in the proceeding, as that interest relates to the issues on which the intervenor intends to participate.

(f) An intervenor who intends to request compensation for costs of judicial review to subsection (a) shall file a supplemental notice of intent within 30 days after the commencement of any judicial review proceeding. The supplemental notice of intent shall identify the issues upon which the intervenor intends to participate in judicial review, and an itemized estimate of the compensation that the intervenor expects to request by reference to those identified issues. If the intervenor intends to support the Commission's decision on review, the supplemental notice of intent shall include a showing of why the intervenor expects that its participation in judicial review will supplement, complement or contribute to the Commission's defense of its decision.

Note: Authority cited: Sections 1701 and 1804, Public Utilities Code. Reference: Section 1804, Public Utilities Code.

76.75. (Rule 76.75) ~~Replies to Responses to Requests for an Award of Compensation, Reply to Responses~~

- (a) The request for compensation shall identify each issue resolved by the Commission for which the intervenor claims compensation, and shall specify the pages, findings, conclusions and/or ordering paragraphs in the Commission decision which resolve the issue.
- (b) The request for compensation shall include time records of hours worked that identify:
 - (1) the name of the person performing the task;
 - (2) the specific task performed;
 - (3) the issue that the task addresses, as identified by the intervenor; and
 - (4) the issue that the task addresses, as identified by the scoping memo, if any.
- (c) The request for compensation shall itemize each expense for which compensation is claimed.
- (d) The request for compensation may include reasonable costs of participation in the proceeding that were incurred prior to the start of the proceeding.
- (e) The request for compensation may include reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs incurred as a result of an application for rehearing.
- (f) If the proceeding involved multiple intervenors, the request for compensation shall include a showing that the participation materially supplemented, complemented, or contributed to the presentation of any other party with similar interests.
- (g) If the Commission staff or any other party files a response to a customer's request for an award of compensation, the customer may file a reply within 15 days after service of the response.

Note: Authority cited: Section 1701, Public Utilities Code. Reference: Section 1804, Public Utilities Code.

(END OF APPENDIX A)

APPENDIX B Service List

Service List in R.05-07-015

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(END OF APPENDIX B)